No. 95-1973

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

GUY E. ADAMS, ET AL.,

Petitioners,

vs.

CHARLIE FRANK ROBERTSON AND
LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

AMICUS CURIAE BRIEF OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS
AND LAWYERS FOR CIVIL JUSTICE
IN SUPPORT OF THE RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

RULES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

The National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association.[1] Its more than 14,000 member companies and subsidiaries, including approximately 10,000 small manufacturers, are in every state and produce about 85 percent of U.S. manufactured goods. Through its member companies and affiliated associations, the NAM represents every industrial sector and more than 18 million employees.

Lawyers for Civil Justice ("LCJ") is a nationwide coalition of defense trial lawyers and corporate counsel sponsored by three national defense bar associations: the Defense Research Institute, the International Association of Defense Counsel, and the Federation of Insurance and Corporate Counsel. LCJ's mission is to work closely with 60 state defense bar associations throughout the United States to restore, promote, and maintain balance in the civil justice system by, among other activities, appearing as *amicus curiae* on important issues affecting the civil justice system and the litigation process.

Amici's members frequently are named as defendants in class action lawsuits. We file this brief to articulate the real world costs and complications that acceptance of Petitioners' extreme and unsupported interpretation of the Due Process Clause of the United States Constitution would have on businesses and the judicial system as a whole.

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[1]Counsel for both the Petitioners and the Respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

JURISDICTIONAL STATEMENT

Petitioners assert jurisdiction under 28 U.S.C. § 1257(a). Pet. Brief at 1. *Amici* respectfully suggest the absence of jurisdiction in this Court for the following reasons:

1. The Alabama Supreme Court decision was based on state court rules of civil procedure and the Alabama Constitution.

2. The question presented by Petitioners in this Court was not presented to or considered by the Alabama Supreme Court.

STATEMENT OF THE FACTS

Charlie Frank Robertson, in his individual capacity, sued Liberty National Life Insurance Company for fraudulent loans against his life insurance policy on May 12, 1992. On October 2, 1992, "the complaint was amended to add new allegations concerning a pattern and practice of fraud that caused approximately 200,000 holders of old cancer policies to exchange their policies for new cancer policies." Pet. App. at 3a. The amended complaint identified Robertson as a class representative and sought equitable and legal relief on a class basis under Alabama Rule of Civil Procedure 23 ("Ala. R. Civ. P. 23"). "Certain policyholders filed objections to their inclusion in the class" and others attempted to file their own class actions, which the trial court stayed. Pet. App. at 4a.

Five months later, on March 10, 1993, the trial court preliminarily certified a class action pursuant to Ala. R. Civ. P. 23(b)(2). Pet. App. at 32a. On April 30, 1993, objectors formally moved to intervene, requesting leave to be excluded from the class action. Petition for a Writ of Certiorari at 10, *Adams v. Robertson*, No. 95-1873 (Ala. 1995). On June 16,

1993, the trial court preliminarily approved a settlement agreement entered into between Liberty National and the class representatives subject to notice to the class and a fairness hearing. *Id.* at 4a. In August of 1993, notice was mailed individually to more than 400,000 policyholders, along with a copy of the proposed settlement agreement, advising them of their opportunity to object and be heard at the fairness hearing. *Id.*

The fairness hearing was held January 20, 1994. Many of the 400 objectors were represented by counsel. Pet. App. at 24a-26a. Prior to the hearing, objectors had participated in limited discovery, had been permitted to depose the actuarial expert for the class and to participate in depositions of representatives of Liberty National's parent company, Torchmark Corporation. Pet. App. at 19a. At the hearing, six of the objectors were permitted to testify in open court, *id.*, and "no objector was denied an opportunity to be heard in person (or, if they chose, by affidavit). . ." *Id.* at 26a. "The parties and objectors also offered voluminous documents and sworn testimony, including depositions, exhibits, and trial testimony." Pet. App. at 25a. On February 4, 1994, the trial court conditionally approved the settlement, and directed some modifications of its terms. On May 19, 1994, the trial court held a final hearing and entered its findings of fact and conclusions of law in an order dated May 26, 1994. The trial court certified the class as one predominantly for equitable relief, and found that Petitioners' claims for money damages were speculative at best. Pet. App. at 5a, 37a. The Alabama Supreme Court affirmed the trial court on December 22, 1995, finding that the class was properly certified as one for predominantly equitable relief; that the relief sought was predominantly equitable, even though some money damages were available as restitution; that the settlement was the result of arms-length bargaining and was fair; and that the Due

Process Clause of the Alabama Constitution did not require the objectors to be given a right to opt-out of the class and did not violate objectors' right to trial by jury. *Adams v. Robertson*, 676 So.2d 1265 (Ala. 1995).

SUMMARY OF THE ARGUMENT

An ever increasing number of *amici's* members find themselves in the predicament faced by Liberty National in this case. They are confronted, as Liberty National was here, with a state whose liability laws and civil jury tradition encourage extreme, windfall damages verdicts against deep-pocket business defendants who risk going to trial, even in individual cases. Moreover, because it is a convenient mechanism for aggregating unasserted claims, the class action device, interpreted far beyond its logical and intended limits, multiplies exponentially the risk of defending even spurious claims.

The staggering potential liability of going to trial on 400,000 claims in Alabama understandably compelled Liberty National -- and other businesses who find themselves in similar circumstances -- to settle claims that could have been defended on the merits if the risks had not been so high. Given this Hobson's choice, Liberty National chose to settle, rather than fight. However, if as Petitioners contend, class members have a constitutionally mandated right to opt-out of equitable relief class settlements where none now exists -- merely because they claim speculative monetary damages -- defendants' liability would be open-ended and final resolution of such litigation would be difficult, complicated and highly speculative.

ARGUMENT

I. Important Practical Reasons Militate Against Unlimited Opt-Out Rights In All Types Of Class Actions.

Federal jurists, academics, and commentators increasingly have recognized that the current class action experiment, started thirty years ago with promulgation of the 1966 Amendments to Federal Rule of Civil Procedure 23 governing class actions,[2] has devolved into a process often resulting in grave injustice and unpredictable outcomes inimical to basic fairness and the efficient use of the civil justice process. *See, e.g., Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir.), *reh'g en banc denied*, 1996 US App. LEXIS 15416 (3d Cir. June 27, 1996), *cert. granted*, 65 U.S.L.W. 3159 (U.S. Nov. 1, 1996)(No. 96-270); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Medical Systems*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S.Ct. 184 (1995). Indeed, the problems with class action litigation have fallen on both plaintiffs and defendants alike. *See, e.g.*, John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOKLYN L. REV. 961 (1993).

Acceptance of the rule that Petitioners advance, that Due Process requires a right to opt-out for class members who seek money damages when the predominant class relief is equitable, would eliminate the distinction between the three

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[2] *See* Benjamin Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969).

different categories of classes, each of which has served a discrete purpose in American class action jurisprudence. Moreover, a brightline rule, such as Petitioners urge, would invite even greater injustice and abuse of an already troubled procedural device.

Businesses have a vital interest in preserving the safety valve that Liberty National chose here -- accept the *quid pro quo* of comprehensive peace as to all members of the class in return for the benefits given to class members in the settlement agreement. Petitioners' call for an absolute right to opt-out, whenever monetary damages are claimed, would undermine one of the primary motivations behind settlements, by making it virtually impossible to reach a comprehensive peace in any type of class action.

As the trial court found here, every class member permitted to opt-out of a class settlement to litigate an individual claim creates a risk that the judgment in the individual litigation will adversely affect the remaining class members and their rights in several respects. Pet. App. at 85a; *See* George Rutherglen, *Better Late Than Never: Notice and Opt Out At the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258 (1996). The trial court recognized that large non-compensatory damages or punitive damages reduce the amount of money potentially available to resolve the class claims. Even if these windfall verdicts occur in only a few cases, they can total hundreds of millions of dollars. They have the potential not only to diminish the benefits available to the class members, but also to jeopardize the financial viability of the defendant, perhaps forcing it into bankruptcy or putting it out of business altogether.

Here, 400 individuals from a 400,000 member class are attempting to opt-out of the court approved settlement class. To

satisfy the desire of one tenth of one percent of the class to play the litigation lottery, Petitioners would place at risk the very cancer insurance policies that this litigation was brought to protect. If Respondent Liberty National were to suffer million dollar verdicts in individual cases in addition to the millions it already has agreed to pay as part of the settlement, it would be unable to honor its policies at the time the class members may need it most -- when they are struck with cancer. Indeed, that result becomes even more likely if the company were forced into bankruptcy, which *amicus* the Association of Trial Lawyers of America suggests as the outer limit of plaintiffs' Due Process rights to opt-out. *Amicus Curiae* Brief of the Association of Trial Lawyers of America at 4-5, *Adams v. Robertson*, No.95-1873 (Ala. 1995). Society at large should not suffer the economic consequences of lost jobs and erosion of the tax base, merely to satisfy the desire of a few claimants to pursue their own claims.

Another result of permitting individuals to opt-out of class actions predominantly for equitable relief is likely to be a decrease in settlements. One important inducement to settlement is the opportunity to resolve the claims as to all class members at once. Without finality, settlement is not a viable alternative. Indeed, there is no business purpose to support time-consuming and expensive settlement negotiations if, after a settlement is consummated, hundreds of plaintiffs have an opportunity to seek redress through individual jury trials. Furthermore, resolution of these complex, time-consuming cases will be delayed, reducing the ability of the courts to hear new cases waiting outside the courthouse door.

Broad rights to opt-out of class action settlements can and have caused settlement agreements to collapse. See, e.g., Joseph Nocera, *Fatal Litigation, Part II: Dow Corning Succumbs*, FORTUNE, October 30, 1995, at 137, 146. The more

class members who opt-out, the greater the strain on the civil justice process as more claims must be brought to trial.

The above practical reasons apply with particular force to class actions in which the relief is predominantly equitable and reinforce the conclusion that due process does not require unlimited opt-out rights in all types of class actions.

II. Due Process Does Not Require An Absolute Right To Opt-Out Of A Class Action For Equitable Relief.

To whatever extent Petitioners may properly have raised a question under the Due Process Clause of the United States Constitution for this Court to decide, they have failed to articulate a rationale that would justify transforming a procedural device, such as a class action opt-out mechanism, into a right of constitutional dimension. From an historical perspective, creating a right to opt-out of a class action for equitable relief would be a departure from several centuries of mandatory class action jurisprudence, justified by nothing more than Petitioners' own desire to participate on their own terms in the punitive damages lottery. The money damages they claim, compensatory damages for mental anguish and punitive damages, do not rise independently to the level of individual rights that the Due Process Clause was intended to protect. Finally, the constitutional authority upon which they rest their claim, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), does not support the existence of opt-out rights in class actions predominantly for equitable relief, particularly where in personam jurisdiction is not at issue.

A. History Does Not Support A Right To Opt-Out of Equitable Class Actions.

Although there is some scholarly disagreement as to the circumstances surrounding and frequency with which courts of equity aggregated claims for group adjudication,[3] the tradition from which the Due Process Clause of the Fourteenth Amendment descended clearly included at least some instances of mandatory justice in the aggregate. Yeazell, *supra* note 3, at 868-871; Kaplan, *supra* note 3, at 358-362.

The mandatory nature of class actions originated in cases involving the adjudication of common rights. Kaplan, *supra* note 3, at 359. In such cases, it was impossible to determine the rights of some without also determining the rights of all and, thus, there was no need or desire to opt-out of the judgment. *See* Kaplan, *supra* note 3, at 360-362.

Over time a "hybrid" form of class action took hold in which the litigants' rights were several, not common, but an adjudication as to one essentially determined the rights of the others. Kaplan, *supra note* 3, at 377, 381. The relief requested usually was equitable, operating against the conduct of the

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[3] *Compare* Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COL. L. REV. 866 (1977) (arguing that prior analysis of the history of group adjudication lacked access to key materials and resulted in erroneous conclusion that group adjudication was common) *with* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967); Zachariah Chafee, SOME PROBLEMS OF EQUITY (1950); and Harry Kalven, Jr. and Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 UNIV. CHI. L. REV. 684 (1941)(all suggesting that various forms of group adjudication were common throughout development of civil justice system).

defendant, and it sometimes included ancillary monetary relief. Yeazell, *supra* note 3, at 890. These hybrid class actions were characterized by the cohesiveness of the class members and their claims against a common opponent. *See* Yeazell, *supra* note 3, at 868-871. These actions also provided no right for class members to opt-out; it was considered more fair, as a practical matter, to allow all members to participate. Kaplan, *supra* note 3, at 359. Moreover, the mandatory nature of these types of classes created significant efficiencies for the courts when it was possible to conclusively resolve all claims in one proceeding.

In classes for money damages, because the class members' rights were several, courts initially found class actions appropriate only as to class members who affirmatively opted into the litigation. For example, the 1938 Federal Rules of Civil Procedure did not expressly authorize a class action for money damages, as did its 1966 counterpart, but the rule and cases decided under it reflect these concerns. *Compare* 1937 Advisory Committee Note, Advisory Committee on Civil Rules, Committee on Rules of Practice and Procedure, U.S. Judicial Conference, *reprinted in* FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 96 Pamphlet, at 94 (West ed. 1996) *with* 1966 Advisory Committee Note, Advisory Committee on Civil Rules, Committee on Rules of Practice and Procedure, U.S. Judicial Conference, *reprinted in* FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 96 Pamphlet, at 97 (West ed. 1996). This is the first instance where Due Process appears as an institutional concern in group adjudications, and it arose because of the several nature of the rights being adjudicated. Kaplan, *supra* note 3, at 391-392.

The right to opt-out came into being with the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure. The 1966 amendments changed the default

mechanism for Rule 23(b)(3) classes from one which required class members to opt-in to one that automatically included everyone in the class unless they expressly opted-out. This change was made because the one-way intervention provided under the 1938 version of the Rule was considered unfair to defendants, *Union Carbide and Carbon Corp. v. Nisley*, 300 F.2d 561, 588 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1962), and because it was believed that by making inclusion in the class the default position, it would better protect the "little guy." Marvin E. Frankel, *Amended Rule 23 From A Judge's Point of View*, ANTITRUST L. J. 295, 299 (August 19, 1966).

The 1966 federal rulemakers also made significant changes to what was called the hybrid class action, the (b)(2) class in modern parlance. The (b)(2) class was envisioned as a mechanism to resolve equitable group claims against institutions and organizations, primarily discrimination and antitrust cases. Although the relief sought would be predominantly equitable, the rulemakers did anticipate that money damages would be part of many actions. For that reason, the 1966 Advisory Committee Notes expressly authorize claims for money damages in (b)(2) actions so long as the predominant relief is equitable. However, the same 1966 rulemakers concluded that Due Process did not require a right to opt-out of classes where the predominant relief was equitable -- even when money damages were claimed.

B. Petitioners' Claims For Money Damages Do Not Rise To The Level Of Fundamental Rights.

In essence, what Petitioners are arguing is that they have a fundamental right to opt-out of a class action whenever money damages have been claimed.[4] However, this Court has been wary of denominating procedural protections as "fundamental rights" guaranteed to every citizen in every court, state or federal, by the Due Process Clause. *See, e.g., Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 127 (1992)(historically, the guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty or property). Petitioners' assertion of the right independently to pursue in Alabama state courts money damages for mental anguish and punitive damages does not rise to the level of "fundamental rights."

As the trial court found, Petitioners' monetary claims are highly speculative. Pet. App. at 37a. In fact, claims for mental anguish in the absence of physical injury were disfavored in Alabama until relatively recently. *See, e.g., Taylor v. Baptist Medical Center, Inc.*, 400 So.2d 369, 375 (Ala. 1981) (Almon, J., dissenting)(the majority opinion permitting monetary recovery for emotional distress in the

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[4] *Amicus*, the Association of Trial Lawyers of America, invites this Court to find that Petitioners have a right to separate pursuit of their money damages under the Seventh Amendment of the U.S. Constitution. However, this Court has not found that the Seventh Amendment right of trial by jury is applicable to the states, and the decision under review comes from a state court and rests entirely on state law. Since the Alabama Supreme Court did not consider the issue under the U.S. Constitution, and Petitioners failed to raise that issue here, there is no jurisdictional basis for the Court to address the issue. *See Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988).

absence of physical injury "is a departure from the long standing rule in this jurisdiction"). Furthermore, claims for mental anguish have been rejected as unprecedented by numerous state courts. *See, e.g.*, 11 A.L.R. 5th 88 (1993)(damages in an action for fraud are generally limited to actual pecuniary loss). Only recently have a few states permitted such damages under any circumstances. *See, e.g., Kilduff v. Adams*, 593 A.2d 478 (Conn. 1991). Thus, it cannot be said that money damages for mental anguish have historical precedent or are part of traditional practice such that Due Process protects them as fundamental rights.

Although punitive damages have a long legal history, a claim for punitive damages is not recognized as a free standing cause of action. *PSG Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 417 F.2d 659, 663 (9th Cir. 1969), *cert. denied*, 397 U.S. 918 (1970); *Evans v. Newport News Shipbuilding and Dry Dock Co.*, 243 F. Supp. 1017 (E.D. Va. 1965), *aff'd* 361 F. 2d 364 (4th Cir. 1966), *cert. denied* 385 U.S. 959 (1966). As this Court recently found, Due Process requires there to be a reasonable relationship between the amount of punitive damages awarded and the conduct that the damages are intended to punish or deter. *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1595 (1996). The right to claim punitive damages is derivative of an underlying cause of action and, therefore, is not a fundamental right guaranteed by the due process clause of the Constitution. *See Henderson v. Alabama*, 627 So. 2d 878 (Ala. 1989), *reh'g denied, without op.*, 1993 Ala. LEXIS 1336 (no individual right to punitive damages in Alabama); *see also Gore*, 116 S. Ct. at 1595 (punitive damages intended to advance societal goals of punishment and deterrence, not provide compensation for injuries); *IBEW v. Foust*, 442 U.S. 42, 48 (1979).

C. *Shutts* Does Not Support Petitioners' Claim.

Petitioners' Due Process claim relies heavily on this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Petitioners' reliance on *Shutts* is misplaced. In *Shutts*, the question presented was whether a state court had personal jurisdiction over absent, non-citizen members of a putative class action seeking monetary relief. *Id.* at 803-804. This Court found that Due Process required the forum state to provide absent class members with notice and an opportunity to opt-out of the class action before it could exercise personal jurisdiction over them. *Id.* That issue is not presented here.

CONCLUSION

For the foregoing reasons, the Writ should be dismissed as improvidently granted, or the judgement should be affirmed.

Respectfully Submitted,

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